

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DANE FERGUSON,

Defendant-Appellant.

UNPUBLISHED

November 14, 2006

No. 263275

Oakland Circuit Court

LC No. 2004-199388-FH

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant Robert Dane Ferguson appeals as of right from his bench-trial convictions of two counts of third-degree criminal sexual conduct (sexual penetration accomplished by force or coercion) (CSC III).¹ The trial court sentenced Ferguson to 2 to 15 years in prison for each CSC III conviction. We affirm. We decide this appeal without oral argument.²

I. Basic Facts And Procedural History

On August 28, 2004, Arkena Slayton, a man named Ken, Dontez Hunter, and Ferguson were all at Hunter's house playing cards and drinking, when Hunter called his girlfriend, the complainant, and invited her over. At about 11:00 p.m., the complainant arrived at Hunter's house. The complainant joined the others in playing cards and drinking. The complainant intended to spend the night there and have sex with Hunter. She consumed three cups of vodka and orange juice and became intoxicated. Slayton, Hunter, and Ferguson were also drunk.

Toward the end of the night, after playing cards for a while, the complainant felt a little sick and quit the card game so she could lie down. At Hunter's advice, she took the change of clothes given to her by Hunter, took a shower, and went to bed in Hunter's bedroom by herself. The complainant did not turn the lights or the TV on, but the lights were on in the dining room where the rest of the group continued to play cards for a short time. The complainant laid in the bed, under the covers, and fell asleep. Ferguson knew that the complainant went into Hunter's bedroom.

¹ MCL 750.520d(1)(b).

² MCR 7.214(E).

The complainant testified that, while she was sleeping, she felt someone pulling her shorts down. The room was dark and no light, not even a clock or radio light, was on. She thought it was Hunter because it was his “bed in his house, and [she] didn’t figure anybody else would come into the room.” She did not object and did not say anything because she would not have resisted Hunter. Ferguson performed oral sex on the complainant. It was extremely dark in the room, and the complainant kept her eyes closed most of the time. When she opened her eyes, she could not see anything. She touched the top of Ferguson’s head with one hand, and, although she felt that his hair was thicker than Hunter’s hair, she did not “think anything at the time. [She] wasn’t focusing on his head or his hair.” While Ferguson was performing oral sex, the complainant called Hunter’s name, but she heard no response. Ferguson did not say anything during the whole event. Ferguson moved closer to her on the bed and engaged in vaginal intercourse, but it did not last long. Ferguson then performed oral sex again. The complainant could not see Ferguson and could not tell if it was someone other than Hunter. The complainant testified that the sex was consensual, but she believed that the person with whom she was having sex was Hunter. She also stated that, had she known the person in the room was Ferguson, she would not have consented to the sexual acts.

Ferguson testified that when everybody laid down, he went into the bathroom because he felt sick. After he used the bathroom, only a few minutes after he saw the complainant go into Hunter’s bedroom, he “found [himself] in [Hunter’s] room,” took his pants and underwear off, and laid down in the bed. Ferguson was wearing only his shirt. He stated that after he laid down in the bed, the complainant began touching him, and he “just did what came natural.” Ferguson also stated that the room “was not that dark,” and he could see the bed and the person he was having sex with. He did not remember hearing the complainant call Hunter’s name. Ferguson testified that he did not conceal who he was and did not act like somebody else. He believed that the sexual acts were consensual.

II. Sufficiency Of The Evidence

A. Standard Of Review

Ferguson argues on appeal that there was insufficient evidence to sustain his CSC III convictions. We review *de novo* a challenge to the sufficiency of the evidence in a bench trial, and we view the evidence in the light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt.³

B. CSC III

The offense of CSC III requires proof beyond a reasonable doubt that the defendant engaged in sexual penetration with another person under specific aggravating circumstances,

³ *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), *aff’d* 466 Mich 39 (2002).

including sexual penetration accomplished by force or coercion.⁴ “The existence of force or coercion is to be determined in light of all the circumstances, and includes, but is not limited to, acts of physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or *concealment or surprise to overcome the victim*.”⁵ Because the statute does not define the terms “concealment” or “surprise,” this Court should use their plain and ordinary meaning, and may review dictionary definitions for this purpose.⁶ *The Random House Webster’s College Dictionary* (1997) defines “conceal” as “to hide; cover or keep from sight; to keep secret; avoid disclosing or divulging,” and “surprise” as “to strike with a sudden feeling of wonder or astonishment, esp. by being unexpected; to come upon or discover suddenly and unexpectedly; to make an unexpected assault on [a person]; to lead or bring unawareness into doing something unintended.” Evidence that the defendant concealed his identity and took advantage of the complainant’s misidentification of the defendant as someone else to induce her to engage in sexual acts with him is sufficient to establish coercion by concealment or surprise.⁷

Viewed in a light most favorable to the prosecution, the evidence presented at trial was sufficient to establish the elements of CSC III based on the theory of concealment or surprise. Ferguson admits that he engaged in sexual penetration with the complainant. His sole issue on appeal is that there was insufficient evidence to find the element of coercion by concealment or surprise. However, the evidence presented showed that Ferguson concealed his identity and surprised the complainant.

The complainant went to Hunter’s house with the intention to spend the night and have sex with Hunter. The complainant went to sleep in Hunter’s bedroom. Ferguson then went into Hunter’s room and engaged in sexual acts with the complainant. Although he knew that the complainant was intoxicated and that it was very dark in the room, Ferguson failed to divulge or disclose his identity when the complainant called out Hunter’s name. Ferguson did not say anything during the whole event. The complainant testified that she consensually engaged in the sexual acts because she believed she was having sex with Hunter; had she known the person in the room was Ferguson, she would not have consented to the sexual acts. Later, Ferguson apologized for his conduct.

Ferguson’s conduct amounted to concealment. Although, unlike the defendant in *People v Crippen*,⁸ Ferguson did not wear a mask or otherwise actively try to disguise himself, he avoided disclosing or divulging his identity knowing that the complainant misidentified him. Moreover, Ferguson’s actions amounted to surprise. Knowing that the complainant misidentified him as Hunter, Ferguson led the complainant to engage in unintended sexual acts with him. “The complainant did not knowingly consent to performing sexual acts *with*

⁴ MCL 750.520d(1)(b); *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000).

⁵ *Crippen*, *supra* at 282-283, citing MCL 750.520b(1)(f)(i)-(v) (emphasis in the original).

⁶ *Id.* at 283.

⁷ *Id.* at 284.

⁸ *Crippen*, *supra* at 278.

defendant; only through defendant's concealment of his identity was he able to persuade . . . [her] to submit to his sexual advances."⁹ The complainant's intention was to have sex with Hunter, not with Ferguson. Thus, Ferguson led her into doing something unintended.

Although there were some testimonial discrepancies, absent exceptional circumstances, issues of witness credibility are for the trier of fact.¹⁰ Accordingly, viewed in a light most favorable to the prosecution, we conclude that there was sufficient evidence to find that the essential elements of CSC III were proven beyond a reasonable doubt.

Affirmed.

/s/ William C. Whitbeck

/s/ Bill Schuette

⁹ *Id.* at 284 (Emphasis in the original).

¹⁰ *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003).